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Nos. 85-98 and 85-99

In the Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GmbH., PETITIONER

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, ET AL.

MESSERSCHMITT BOLKOW BLOHM, GmbH., PETITIONER

v.

VIRGINIA WALKER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a federal district court, adjudicating a private civil suit involving a foreign national subject to the court's jurisdiction, must employ the procedures set forth in the Hague Evidence Convention to discover evidence within the possession or control of the foreign national but located abroad.

2. Whether, if the Hague Evidence Convention is not the exclusive method for obtaining such evidence, principles of international comity nevertheless require the use of the Convention in the present cases.



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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are corporations based in the Federal Republic of Germany (Germany) that are presently defending unrelated private tort suits in United States courts. They seek review of the court of appeals' refusal to vacate separate federal court discovery orders, entered in accordance with the Federal Rules of Civil Procedure, that require production in this country of documents and deponents located in Germany. Neither petitioner presently contests that it is subject to the jurisdiction of the United States courts. Each contends, however, that the relevant discovery order is invalid. They maintain that the Hague

Evidence Convention[1] provides the exclusive avenue for private litigants in United States courts to obtain discovery of evidence presently located in Germany. In addition, they argue that even if the Hague Evidence Convention is not the sole method for obtaining that evidence, principles of international comity compel its use in the present cases. In their view, a "letter of request" from the federal district court to German judicial authorities, executed in conformance with the Convention's provisions, is the appropriate method for obtaining evidence located abroad.[2]

1. The petitioner in No. 85-98, Anschuetz & Co., GmbH., is a third-party defendant in an admiralty tort suit arising from a 1979 collision in the Port of New Orleans. In that incident, a Spanish vessel, the M/V Pola de Lena, chartered by Gijonesa de Navegacion S.A. (Gijonesa), collided with the Gretna Ferry Landing and two ferry boats owned by the Mississippi River Bridge Authority. The Bridge Authority and others sued Gijonesa for damages. Gijonesa filed a third-party complaint against Anschuetz, which manufactured the steering device on the Pola de Lena. The third-party complaint alleged that failure of the steering system caused the collision. 85-98 Pet. App. 3a.

Gijonesa served Anschuetz with extensive interrogatories, requests for production of documents, and notices of depositions to take place in Germany. Anschuetz moved for a protective order on the ground that the discovery request was overbroad. The magistrate denied the protective order and directed Anschuetz to comply with most of the discovery demands (85-98 Pet. App. 4a-5a). In early April 1984, some of the deponents—Anschuetz employees subject to deposition pursuant to Fed. R. Civ. P. 30(b)(6)—apparently were examined in Germany (see 85-98 Pet. App. 5a, 35a, 40a).

Soon thereafter, Anschuetz moved for a protective order to prevent further depositions scheduled to take place in Germany on May 2, 1984. It asserted, apparently for the first time, that

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[1] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 *et seq.* (entered into force between the United States and the Federal Republic of Germany on June 26, 1979) [hereinafter cited as Hague Evidence Convention].

[2] See Hague Evidence Convention, arts. 1-14, 23 U.S.T. 2557-2564 (describing the procedures for utilizing a letter of request).

the discovery should be obtained through the procedures of the Hague Evidence Convention. The Magistrate denied that motion (85-98 Pet. App. 5a). Anschuetz appealed to the district court, which affirmed the magistrate's ruling (*id.* at 28a-38a).

Anschuetz requested a writ of mandamus from the court of appeals to prevent the taking of depositions and production of documents in Germany. The court of appeals stayed the district court discovery proceedings and requested the views of Germany and the United States concerning the applicability of the Hague Evidence Convention in the present case (85-98 Pet. App. 5a). Germany filed a brief amicus curiae stating that the district court's discovery order, requiring the taking of depositions and the production of documents in Germany, "would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the [Hague] Evidence Convention." Germany Amicus Br. 8, *In re Anschuetz & Co., GmbH,* No. 84-3286 (5th Cir.).

The United States filed a brief amicus curiae stating that the Hague Evidence Convention is not the exclusive means for obtaining evidence located in foreign countries. U.S. Amicus Br. 7, *In re Anschuetz & Co., GmbH*, No. 84-3286 (5th Cir.). The brief observed, however, that the conduct of depositions on German soil would be offensive to German sovereignty and could not be undertaken without resort to the Convention (*id.* at 9-10). The United States' brief also stated that, given Germany's sovereignty-based objections to the production of documents located in Germany, the district court should be required to reconsider its order, applying a careful comity analysis (*id.* at 7).

The court of appeals issued a lengthy opinion denying the petition for a writ of mandamus (85-98 Pet. App. 1a-27a). The court concluded that the Convention does not provide the exclusive means for obtaining evidence located in member countries (*id.* at 8a-11a, 24a). It ruled that a federal district court possessed of appropriate jurisdiction retains the power to order discovery from foreign nationals in accordance with the Federal Rules of Civil Procedure (*id.* at 23a).

The court of appeals concluded, however, that "in the realm of international discovery we believe the exercise of judicial power should be tempered by a healthy respect for the principles of comity" (85-98 Pet. App. 23a). It acknowledged Germany's objections to the discovery order, but nevertheless stated (*id.* at 26a):

> We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's *in personam* jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules.

Although the court of appeals refused to issue a writ of mandamus, it directed the district court to reconsider its discovery orders "in the light of the principles expressed in this opinion" (*id.* at 27a). In particular, the court of appeals observed that the district court could "order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty" (*ibid.*).

2. The petitioner in No. 85-99, Messerschmitt Bolkow Blohm, GmbH., is a co-defendant in a wrongful death action arising from a 1982 helicopter crash near McKinney, Texas (85-99 Pet. App. 1a). In the course of discovery, the plaintiffs requested that Messerschmitt produce documents located in Germany. Messerschmitt objected, maintaining that production of those documents through means other than the Hague Evidence Convention would violate Germany's sovereignty (85-99 Pet. App. 2a). The magistrate ordered production of the evidence (*id.* at 13a-15a), concluding that resort to the Hague Evidence Convention "would be a futile gesture" (*id.* at 14a). The district court affirmed the magistrate's order (*id.* at 9a-12a).

Messerschmitt then petitioned the court of appeals for a writ of mandamus to vacate the discovery order.[3] That court, turning to its recent decision in *Anschuetz* for guidance, denied the petition (85-99 Pet. App. 1a-8a). It concluded that, under *Anschuetz*, "the Federal Rules of Civil Procedure, not the Hague Convention, normally govern the discovery of documents from foreign parties subject to the jurisdiction of a United States court, even though those documents are physically located in the territory of a foreign signatory of the Hague Convention" (*id.* at 3a).

The court of appeals observed, however, that *Anschuetz* required a court to "consider whether, as a matter of international comity, the parties should be required to proceed under the Hague Convention before discovery is compelled under the Federal Rules of Civil Procedure" (85-99 Pet. App. 3a-4a, (footnote omitted)). Weighing "Germany's interest in maintaining control over its judicial system against the American interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States" (*id.* at 4a), the court concluded that the discovery order was proper. It stated (*id.* at 5a):

> The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States. The order for production of documents, therefore, appears to balance appropriately the considerations involved.

"Finding nothing in the district court orders that transgresses *Anschuetz*" (*id.* at 8a), the court of appeals denied the mandamus petition.

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[3] Messerschmitt also sought review of a district court order permitting deposition of Messerschmitt's expert witnesses (see 85-99 Pet. App. 2a). Messerschmitt indicates that that issue has since become moot (85-99 Pet. 4 n.4).

DISCUSSION

These cases present recurring questions concerning the use of the Hague Evidence Convention to obtain foreign evidence for use in private suits. We agree with petitioners that these questions are important. However, we believe that the court of appeals' decisions, while containing some troublesome language, are essentially correct. Furthermore, the decisions are in substantial conformity with a growing body of law addressing application of the Hague Evidence Convention. Under these circumstances, further review by this Court is unnecessary.

1. The Hague Evidence Convention provides methods for litigants involved in civil and commercial transnational disputes to obtain evidence from abroad. It is intended to help bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country having a different legal system.[4] The Convention is based on the principle that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972). See *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 Int'l Legal Materials 785, 806 (1969).

The gathering of evidence in a foreign country raises a number of problems. For example, the evidentiary procedures of most civil law countries, including Germany, provide litigants with much less freedom in the collection of evidence for use in foreign litigation than do those of the United States and other common law countries.[5] In addition, countries that view the taking of evidence as a judicial function generally maintain

[4] See S. Exec. A, 92d Cong., 2d Sess. VI (1972); S. Exec. Rep. 92-25, 92d Cong., 2d Sess. 1 (1972); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 Int'l Legal Materials 785, 806 (1969).

[5] See, *e.g.*, Langbein, *The German Advantage in Civil Procedure,* 52 U. Chi. L. Rev. 823 (1985); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation,* 17 Int'l Law. 465, 466-469 (1983); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L.Q. 646, 647 (1969). See generally Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 Harv. L. Rev. 1193, 1443 (1958).

that gathering evidence within their territory, without their participation or consent, threatens their sovereignty.[6] Moreover, evidence acquired under the procedures of a country where the evidence is located may be supplied in a form that is unusable where the action is pending. See S. Exec. A, *supra,* at VI; S. Exec. Rep. 92-25, 92d Cong., 2d Sess. (1972). The Convention addresses these concerns by permitting "greater flexibility in the means available for obtaining evidence abroad" (*id.* at 4 (statement of Deputy Legal Adviser Salans)).

The Hague Evidence Convention provides three alternative methods for conducting evidence-taking proceedings abroad. Under the first method, a litigant may request the court where the action is pending to transmit a "Letter of Request" to the "Central Authority" in the country where the evidence is located. See arts. 1-2, 23 U.S.T. 2557-2558. The Central Authority, selected by the foreign government, then transmits the request to the appropriate foreign court, which conducts the evidentiary proceeding. See arts. 5-13, 23 U.S.T. 2560-2563. Upon request, the foreign court will conduct the evidentiary proceeding under procedures specified by the requesting court, unless those procedures are incompatible with internal law or impracticable. See art. 9, 23 U.S.T. 2561. Under the second method, the litigant may request that a diplomatic or consular officer of the country where the action is pending take evidence in the foreign country to which he is accredited. See arts. 15-16, 23 U.S.T. 2564-2565. Under the third method, the litigant may request that a specially appointed commissioner take evidence in the foreign country. Art. 17, 23 U.S.T. 2565. The three methods are similar to those identified by Fed. R. Civ. P. 28(b).

The letter of request generally is the most useful of the three mechanisms specified by the Convention. The other two methods apply only to noncompulsory evidentiary proceedings and are subject to other substantial limitations.[7] Petitioners urge that discovery in the present cases should be conducted pursuant to letters of request.

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[6] See Edwards, *supra,* 18 Int'l & Comp. L. Q. at 618; *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, supra,* 8 Int'l Legal Materials at 806.

[7] In particular, a party to the Evidence Convention is expressly permitted to reserve the right not to allow the taking of evidence before a diplomat or con-

2. The United States adheres to its previously expressed view that the Hague Evidence Convention does not specify the exclusive means for litigants in United States courts to obtain discovery of evidence located in a foreign country that is a party to the Convention. See Brief for the United States as Amicus Curiae at 6-9, *Club Mediterranee, S.A.* v. *Dorin,* appeal dismissed and cert. denied, No. 83-461 (Oct. 15, 1984). An American court has the power to demand the production of evidence in the United States from foreign nationals who are subject to the court's personal jurisdiction. Nevertheless, as we have also discussed previously (*id.* at 9-13), the exercise of that power is subject to principles of international comity. American courts should utilize the procedures established by the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction resulting from American procedures for pretrial discovery.

a. American courts may exercise jurisdiction over a foreign party if the party's contacts with the forum are sufficient "to make it reasonable and just" for the American forum to adjudicate the dispute. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). American courts, of course, apply their own procedural rules to adjudicate these claims. Prior to the formulation of the Hague Evidence Convention, there was no dispute that federal courts could apply the Federal Rules of Civil Procedure to obtain discovery from foreign litigants of evidence located abroad. See Smit, *International Aspects of Federal Civil Procedure,* 61 Colum. L. Rev. 1031, 1053-1054 (1961). Furthermore, the courts recognized that they had the power to compel discovery of evidence located in a foreign country from parties subject to their jurisdiction. See, *e.g.*, *ibid.; United States* v. *First National City Bank,* 396 F.2d 897, 900-901 (2d Cir. 1968).[8]

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sular officer, or before a commissioner. See arts. 33, 35, 23 U.S.T. 2571, 2572. Germany has made such a reservation. However, pursuant to an exchange of diplomatic notes between the United States and Germany, non-compulsory depositions may be conducted before United States consular officials. See Brief for the United States as Amicus Curiae at 7-9, *Volkswagenwerk A.G.* v. *Falzon,* appeal dismissed, 465 U.S. 1014 (1984).

[8] Congress shared that understanding, even in the case of the Tax Court. For example, since 1954, the Internal Revenue Code has expressly authorized the Tax Court to order foreign corporations that petition for

There is nothing in the language of the Hague Evidence Convention displacing these principles and requiring exclusive recourse to the evidence gathering procedures of the Convention. The Convention does not state that it is the sole avenue for obtaining foreign evidence. Indeed, its provisions, read in light of similar international agreements, imply otherwise. For example, the Convention provides that "[i]n civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act" (art. 1, 23 U.S.T. 2557 (emphasis added)). This language stands in marked contrast to that of the Hague Service Convention,[9] which was concluded several years earlier and provides that "[t]he present Convention *shall apply in all cases,* in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362 (emphasis added)).

An examination of the treaty history reveals no intention among the negotiators for the United States, the Department of State, or Congress to prohibit the accepted practice of conducting extraterritorial discovery pursuant to federal and state rules.[10] To the contrary, the Senate Report stated that the Convention, first proposed by the United States, was intended to improve international judicial assistance by promoting letters of request as "a principal means of obtaining evidence abroad."

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refunds to produce documents, "wherever" located, that the Tax Court "may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control." 26 U.S.C. 7456(b).

[9] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 *et seq.* (entered into force for the United States on Feb. 10, 1969).

[10] See S. Exec. A, *supra*; S. Exec. Rep. 92-25, *supra; Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, supra*, 8 Int'l Legal Materials at 804-820. See also Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 760 (1983) ("The author knows of no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit this practice entirely.").

See S. Exec. Rep. 92-25, *supra,* at 1; see also *id.* at 3 (statement of Deputy Legal Adviser Salans). The Senate Report also noted the statement by Philip Amram, United States representative and rapporteur at the Hague Conference, that the Convention " 'makes no major changes in United States procedure and requires no major changes in United States legislation or rules' " (*id.* at 5 (citation omitted)).[11]

Moreover, the practical consequences of treating the Hague Evidence Convention as exclusive render that interpretation implausible. The Convention gives foreign judicial authorities substantial latitude in determining what evidence shall be transmitted to a requesting court. See, *e.g.*, arts. 9-12, 23 U.S.T. 2561-2563; see also *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 788-790 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981). In particular, member countries may elect to refuse letters of request "issued for the purpose of obtaining pre-trial discovery of documents" (art. 23, 23 U.S.T. 2568). Plainly, if the Convention provided the sole method for obtaining evidence from abroad, then foreign authorities could become the final arbiters of discovery disputes in American proceedings. American judges would lose supervisory control over discovery in pending cases and litigants might find it impossible to obtain necessary discovery abroad.[12] The United States, in proposing

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[11] Petitioners suggest that "it is difficult to see why countries such as Germany agreed to compel their citizens to provide evidence to United States courts if it was not in exchange for some limitations on the methods or scope of United States discovery from abroad." 85-98 Pet. 16 (footnote omitted); 85-99 Pet. 14-15 (footnote omitted). It is true that the United States had already provided foreign countries with broad evidence gathering opportunities prior to the Convention's entry into force. See 28 U.S.C. 1781-1782. However, Germany has received additional tangible benefits from the Convention despite its non-exclusive operation. First, the Convention provides an evidence gathering procedure that American courts may use in appropriate cases to prevent international friction. The availability of this optional method reduces the likelihood that United States courts will need to issue discovery requests that Germany might find objectionable. In addition, Germany enjoys the benefits of participation in a multilaterial convention that presumably enhances its evidence gathering opportunities in countries other than the United States.

[12] Petitioners suggest that American courts can cure this problem by "excluding evidence when the opposing party cannot test its probative value through examination of underlying and related evidence located abroad" or by

and ratifying the Convention, certainly did not intend these results.[13] The Convention cannot reasonably be construed as displacing the authority of United States courts to employ traditional discovery devices provided by federal and state court rules.

b. Although the Hague Evidence Convention is not exclusive, it nevertheless remains a valuable and workable mechanism for obtaining evidence abroad. American courts should give serious consideration to its use when they encounter foreign government objections to use of American discovery procedures. Furthermore, courts should refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government. See, *e.g., Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. 16, 28-29 (S.D.N.Y. 1984). The Convention provides a mechanism that, in appropriate cases, can reduce such conflicts.

Principles of international comity should guide a court's determination whether the Hague Evidence Convention should be employed in any particular situation. This Court has described the concept of comity as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

"drawing adverse inferences from a party's failure to produce voluntarily evidence located abroad" (85-98 Pet. 17; 85-99 Pet. 15). However, these remedies are of little help to a plaintiff who needs evidence from abroad to develop and establish his case in chief.

[13] See Oxman, *supra,* 37 U. Miami L. Rev. at 760 ("Absent an express provision in the treaty that a longstanding practice valued by at least some members of the American bar was being abolished * * * it is unreasonable to conclude that the convention implies such a prohibition.").

Hilton v. *Guyot,* 159 U.S. 113, 163-164 (1895).[14]

The comity inquiry depends on the circumstances of each individual case. However, the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965), sets forth some of the relevant considerations. A court should examine the competing interests of the United States and the foreign country, the hardships imposed by the discovery request, what activities are required in the territory of the foreign country, the nationality of the parties, and the extent to which enforcement of the discovery request can be expected to produce the requested evidence. See, *e.g., Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. at 29-32. The court should also examine whether the Convention will provide effective discovery, considering such factors as the likelihood that the evidence can be obtained through Convention mechanisms and the expense, delay and other burdens that might result from their use.

In our opinion, the comity inquiry must remain flexible. The Convention has been ratified by numerous countries[15] and may be applied in a broad range of civil and commercial disputes. The courts therefore must have adequate discretion to consider the wide variety of factors that might be relevant in any particular instance.

3. Petitioners contend that the court of appeals erred in refusing to require application of the Hague Evidence Convention in the present cases, arguing that the Convention was meant to be exclusive and that the requested production of documents and deponents in the United States violates Germany's sovereignty (85-98 Pet. 14-21; 85-99 Pet. 13-19). We believe that the court of

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[14] See, *e.g., Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (D.C. Cir. 1984); *United States* v. *First National Bank,* 699 F.2d 341, 345-347 (7th Cir. 1983); *United States* v. *Vetco, Inc.,* 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States* v. *First National City Bank,* 396 F.2d at 901-905. Cf. *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958).

[15] The Convention is operative in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom.

appeals' resolution of the discovery disputes is essentially correct and requires no further review.

We have already addressed the first question—whether the Hague Evidence Convention is exclusive—in our general discussion of the Convention (pages 8-11, *supra*). In our view, there is no serious dispute that the Hague Evidence Convention provides a non-exclusive mechanism for obtaining evidence from member countries. United States courts are virtually unanimous in concluding that the Convention is not exclusive.[16] As discussed above, that conclusion is supported by the language of the Convention, the events surrounding its formulation, and American judicial practices. The resolution of the issue in the present cases does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. Accordingly, there is no need for further review of that question.

The second question—whether principles of comity require recourse to the Hague Evidence Convention in the present cases—is more difficult. In our view, the court of appeals was ultimately correct in holding that the district court, in both instances, could utilize the Federal Rules of Civil Procedure to require production of documents and party deponents in this country. The court of appeals acknowledged that its analysis "should be tempered by a healthy respect for the principles of comity" (85-98 Pet. App. 23a; see 85-99 Pet. App. 3a-4a). We believe that while the court's comity discussion was rather cursory, its decisions reveal adequate grounds in these cases for choosing to conduct discovery through the traditional methods

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[16] See, *e.g.*, *Lowrance* v. *Weinig*, 107 F.R.D. 386, 388-389 (W.D. Tenn. 1985); *Work* v. *Bier*, 106 F.R.D. 45, 52-53 (D.D.C. 1985); *Slauenwhite* v. *Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616, 618-619 (D. Mass. 1985); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 27-28 (S.D.N.Y. 1984); *Laker Airways, Ltd.* v. *Pan American World Airways*, 103 F.R.D. 42, 48-50 (D.D.C. 1984); *Cooper Industries, Inc.* v. *British Aerospace, Inc.*, 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503, 519-524 (N.D. Ill. 1984); *Pierburg GmbH & Co. KG* v. *Superior Court*, 137 Cal. App. 3d 238, 243-244, 186 Cal. Rptr. 876, 879-880 (1982); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher*, 328 S.E.2d 492, 497 (W. Va. 1985). Petitioners cite no reported decisions urging a contrary conclusion. See 85-98 Pet. 14-15 & n.29; 85-99 Pet. 13-14 & n.28.

prescribed by the Federal Rules of Civil Procedure rather than resorting to the Hague Evidence Convention. The court's decisions are consistent with the emerging case law addressing application of the Hague Evidence Convention. Further review of these decisions therefore appears unnecessary.

Petitioners contend that international comity requires that United States courts first resort to the Hague Evidence Convention before pursuing alternative methods, available under the Federal Rules of Civil Procedure, to secure evidence located in Germany. They submit that this "first-use" requirement is necessary because German sovereignty is violated if "information held in the foreign sovereign's territory by nationals of that sovereign is subject to disclosure by orders framed according to the dictates of an alien jurisprudence" (85-98 Pet. 19; 85-99 Pet. 17-18). Germany agrees (Amicus Br. 6-7), stating that "[o]nly its courts are empowered to compel persons under their jurisdiction to comply with orders of a foreign court requiring the gathering of evidence in the Federal Republic of Germany and its removal to the United States" (*id.* at 7).

We depart at the outset from the broad proposition that principles of international comity obligate American courts to seek first use of the Hague Evidence Convention in *every* instance where litigants seek discovery abroad. Instead, the demands of international comity require only that American courts give respectful consideration to claims of foreign "judicial sovereignty" in light of the precise nature of the foreign interests and the circumstances of the particular case. See *Hilton* v. *Guyot,* 159 U.S. at 164-165. "Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain." *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (D.C. Cir. 1984) (footnote omitted). "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States* v. *First National City Bank,* 396 F.2d at 901.

Germany's sovereignty interest in these cases appears relatively limited. Unlike the situation in *Volkswagenwerk A.G.* v. *Falzon,* appeal dismissed, 465 U.S. 1014 (1984), these cases do

not involve discovery on Germany territory. The orders will not require "any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany" (85-99 Pet. App. 5a).[17] Thus, the challenged discovery will not encroach upon Germany's exclusive authority to conduct judicial activities within its borders.

Furthermore, the discovery orders apparently do not violate any specific "content-based" restrictions upon foreign disclosure of information. For example, petitioners have not claimed that the discovery orders require divulgence of information that Germany treats as confidential under its internal laws. Thus, the discovery in these cases is fundamentally different from production of business secrets or confidential communications that receive substantive protection from disclosure.

Additionally, petitioners do not rely upon a so-called "blocking statute" prohibiting disclosure of information to foreign tribunals. Compare *Club Mediterranee, S.A.* v. *Dorin,* appeal dismissed and cert. denied, No. 83-461 (Oct. 15, 1984). While principles of comity do not require American courts to give conclusive weight to a foreign statute that simply expresses hostility to American discovery procedures, (see *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. at 30), an American court might give some consideration to the existence of such a statute as a measure of the foreign nation's depth of resolve concerning its "judicial sovereignty."[18]

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[17] The court of appeals, sensitive to German territorial sovereignty, specifically observed that the Convention should be employed in the case of an "involuntary deposition of a party conducted in a foreign country" (85-98 Pet. App. 26a; see 85-99 Pet. App. 7a). See *In re Ljusne Katting, A.B.,* No. 85-2573 (5th Cir. Dec. 11, 1985) (holding that the plaintiffs must use the Hague Evidence Convention in the first instance when seeking on-site inspections and depositions on foreign soil).

[18] Germany's assertion of judicial sovereignty, advanced through diplomatic notes and participation in this litigation, is, of course, entitled to similar consideration. We note, however, that the record in these cases does not reveal the precise nature of Germany's "judicial sovereignty." That concept perhaps reflects Germany's general interest in protecting the personal privacy of its citizens. But if that is the case, the German interest should receive diminished deference from foreign tribunals in situations where the German citizen has, in effect, waived that protection by taking actions that

Germany's claim of judicial sovereignty must be weighed against the United States' substantial interest in affording litigants in its courts adequate opportunities to discover the pertinent facts surrounding their claims. The United States' interest finds explicit expression in the discovery provisions of the Federal Rules of Civil Procedure. Those provisions are central to the conduct of federal judicial proceedings. The "pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedures." *Hickman* v. *Taylor*, 329 U.S. 495, 500 (1947). It provides the preferred method for parties to narrow the basic issues and ascertain the existence of facts germane to those issues, ensuring that "civil trials in the federal courts no longer need be carried on in the dark." *Id.* at 501.

Petitioners do not presently dispute the scope or relevance of the evidence sought.[19] Nor do they claim that there are practical or logistical obstacles to producing the evidence in the United States. Thus, there seems to be no serious doubt that compliance with the discovery orders will advance the ultimate resolution of the law suits. On the other hand, petitioners acknowledge that discovery conducted pursuant to the Convention procedures "may be somewhat more time-consuming or cumbersome than a direct discovery order to the foreign party" (85-98 Pet. 20; 85-99 Pet. 18-19). Of particular importance, the district judge in *Anschuetz* and the magistrate in *Messerschmitt* both concluded that resort to the Convention to obtain pretrial discovery of relevant documents would prove futile in light of Germany's express refusal to execute letters of request for that purpose (85-98 Pet. App. 32a; 85-99 Pet. App. 14a).

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subject him to the foreign court's jurisdiction. Furthermore, it is not clear whether German courts would decline to order production of evidence located in a foreign country. One German commentator has suggested that "European courts make a similar claim, although this claim is hidden behind a different configuration of the relevant legal institutions and norms." P. Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 44 (1985) (English Summary). See also *id.* at 45-46.

[19] The magistrate rejected Anschuetz's challenge to the breadth of the discovery order. See 85-98 Pet. App. 4a-5a. We express no opinion whether that ruling is correct under American discovery standards. Messerschmitt did not challenge the scope or relevance of the discovery sought. See 85-99 Pet. App. 11a.

Given these circumstances, we think that the court of appeals could properly refuse to grant mandamus relief excusing petitioners from production of documents and deponents in the United States. As petitioners acknowledge, the mandamus remedy is "by its very nature extraordinary" (85-98 Pet. 13; 85-99 Pet. 12). The writ ordinarily issues only when "there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) (quoting *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953)). Germany's claims of judicial sovereignty do not provide a sufficiently compelling basis in these particular cases to justify issuance of a prerogative writ.[20] In our opinion, those claims also lack sufficient force to justify this Court's review.[21]

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[20] Other courts have refused to follow the Hague Evidence Convention under similar circumstances. See, *e.g.*, *Lowrance* v. *Weinig*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work* v. *Bier*, 106 F.R.D. 45 (D.D.C. 1985); *International Society for Krishna Consciousness, Inc.* v. *Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984); *Murphy* v. *Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Lasky* v. *Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983); *Wilson* v. *Lufthansa German Airlines*, 108 A.D.2d 393, 489 N.Y.S.2d 575 (1985).

[21] In *Anschuetz*, the court of appeals stated (85-98 Pet. App. 26a) that "[t]he Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules." This statement, viewed in isolation, is plainly overbroad. We view it, in context, as simply a poorly-phrased observation that the Convention is not exclusive. Indeed, the court of appeals quickly added that if "discovery * * * of Anschuetz in Germany becomes particularly intrusive * * *, then the [district] court may order the parties to conduct that discovery under the Hague Convention" (*ibid.*). And the court of appeals in *Messerschmitt* undertook a brief comity analysis even though the discovery order under review was limited to production of evidence within the United States (85-99 Pet. App. 3a-5a). Some courts, in interpreting *Anschuetz*, have placed undue weight on the *Anschuetz* dictum. See *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124 (8th Cir. 1986); *Lowrance* v. *Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985). We do not understand that dictum as displacing the need for a discriminating comity analysis even in those instances where discovery from parties is to occur in the United States. See *Work* v. *Bier*, 106 F.R.D. 45, 54-56 (D.D.C. 1985); *Griffis* v. *Aerospatiale Helicopter Corp.*, Civ. No. A-83-602 (D. Alaska June 3, 1985), slip op. 8-12, petition for mandamus pending, No. 85-7556 (9th Cir. filed Oct. 10, 1985). In all events, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioners observe that application of comity principles to the use of the Hague Evidence Convention has prompted considerable litigation and has resulted, at times, in seemingly inconsistent results (85-98 Pet. 7-13; 85-99 Pet. 6-12). They suggest that review by this Court is necessary to secure a uniform rule concerning the Convention's application.

We disagree. The decisions below—"the first time a circuit court has considered the interplay between the Hague Convention and the Federal Rules" (85-98 Pet. App. 6a)—are basically consistent with the better reasoned and more prevalent trend in the case law, which recognizes that resort to the Hague Evidence Convention depends on the particular circumstances in each individual case.[22] They provide appellate affirmation that the Hague Convention is not the exclusive mechanism for obtaining evidence abroad and that a comity analysis is necessary to determine its precise application.[23] The decisions, though somewhat cursory in their comity analyses, should tend to clarify these controlling general principles of international discovery. We expect that other courts will discern and apply these principles and, as a result, dispel any confusion in the preexisting district court decisions. Furthermore, the United States is clearly on record, through this submission, as to how the Convention should be applied. That, too, should minimize confusion among the lower courts in the future. We therefore believe that there is no need for this Court to intervene at this time.

Petitioners also contend that the decisions below, by refusing to require first resort to the Hague Evidence Convention, conflict with a recent decision of the Supreme Court of West Vir-

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[22] See, *e.g.*, *International Society for Krishna Consciousness, Inc.* v. *Lee*, 105 F.R.D. 435, 449-450 (S.D.N.Y. 1984); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 29-32 (S.D.N.Y. 1984); *Murphy* v. *Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 362-363 (D. Vt. 1984).

[23] In *Anschuetz*, the court of appeals "left this comity analysis to the district court on remand" (85-99 Pet. App. 4a; see 85-98 Pet. App. 27a), while in *Messerschmitt*, the court itself conducted a brief comity analysis (85-99 Pet. App. 4a-5a). These decisions thus recognize that a comity analysis is necessary. The Fifth Circuit recently reaffirmed the importance of comity considerations in *In re Ljusne Katting, A.B.*, No. 85-2573 (5th Cir. Dec. 11, 1985), holding that the Hague Evidence Convention must be used in the first instance when seeking on-site inspections on foreign soil and depositions of foreign nationals outside the control of the foreign defendant.

ginia, *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher,* 328 S.E.2d 492, 506 (1985). It appears, however, that the differences between the West Virginia Supreme Court and the Fifth Circuit are relatively modest and do not create a meaningful conflict requiring this Court's review. The supposed conflict seems to stem largely from different assessments of the Convention's effectiveness in securing needed discovery.[24] This Court is not well postured to address that essentially factual dispute. Moreover, *Starcher* was decided just two weeks after *Anschuetz* and nearly one month before *Messerschmitt.* Thus, the West Virginia court did not have the benefit of the Fifth Circuit's views. In these circumstances, the state court decision does not create a conflict of particularly pressing consequence.[25]

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[24] The trial court in *Starcher* ruled that West Virginia discovery procedures must be followed despite the existence of the Convention, apparently giving no consideration to the comparative effectiveness of the Convention's alternative procedures. See 328 S.E.2d at 495. In reversing, the West Virginia Supreme Court indicated that "the principle of international comity dictates first resort to [Convention] procedures until it appears that such attempt has proven fruitless and that further action is necessary to prevent an impasse." 328 S.E.2d at 506. By contrast, the district judge in *Anschuetz* and the magistrate in *Messerschmitt* had both determined, prior to appellate review, that use of the Convention would not provide fully adequate discovery (see 85-98 Pet. App. 32; 85-99 Pet. App. 14a). The court of appeals plainly considered this factor important (see 85-98 Pet. App. 15a-16a; 85-99 Pet. App. 3a-5a). Thus, the divergent results among the cases may simply reflect different perceptions of the Convention's effectiveness. Other decisions from lower courts that have required first resort to the Convention procedures can also be reconciled on this basis. See *Laker Airways, Ltd.* v. *Pan American World Airways,* 103 F.R.D. 42, 51 (D.D.C. 1984); *Philadeliphia Gear Corp.* v. *American Pfauter Corp.,* 100 F.R.D. 58, 60 n.3 (E.D. Pa. 1983); *Pierburg GmbH & Co. KG* v. *Superior Court,* 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876, 880 (1982); *Vincent* v. *Ateliers de la Motobecane, S.A.,* 193 N.J. Super. 716. 721-724, 475 A.2d 686, 689-691 (1984); *Th. Goldschmidt A.G.* v. *Smith,* 676 S.W.2d 443, 445 (Tex. Ct. App. 1984).

[25] We note, in particular, that the purported conflict presents a comparatively minor difference in the accommodation of foreign claims of judicial sovereignty, is purely procedural, and does not subject similarly situated litigants to different standards of liability. The West Virginia litigant, like petitioners, remains obligated to produce the requested discovery; he is simply permitted to attempt production, in the first instance, through the Convention procedures. See 328 S.E.2d at 506. It would appear that future West Virginia

In sum, we suggest that the decisions below are basically correct and will provide adequate guidance for future cases raising similar issues. Further review is unlikely to be productive. Application of the Hague Evidence Convention inevitably turns on the facts of each case; it depends on intractable factors such as the identity of the parties, the nature of the dispute, the type of discovery sought, the countries involved, and their ability and willingness to provide effective implementation of the Convention. Accordingly, it would be difficult for this Court to provide additional specific guidance to the lower courts. Those courts, which have first-hand exposure to the Convention, can address future questions on a case-by-case basis in light of the needs of the particular litigants and the potential utility of the Convention under the circumstances. This Court should intervene, of course, if truly aberrant decisions result. At present, however, we do not perceive a need for this Court to act.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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litigants seeking foreign discovery can resist first recourse to the Convention by establishing to the court's satisfaction that use of the Convention will prove fruitless. Likewise, we expect that future Fifth Circuit litigants seeking foreign discovery may be required to resort to the Convention if the foreign party can demonstrate that use of the Convention will provide effective and efficient discovery.

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